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Supreme Court of the United States

OCTOBER TERM—1964

No. 913

ANTHONY ROMA individually, etc., & ano., etc., and for all others in the employ of the Transit Authority, City of New York, similarly situated,

Petitioner,

vs.

MUNICIPAL CIVIL SERVICE COMMISSION, CITY OF NEW YORK, TRANSIT AUTHORITY, CITY OF NEW YORK, STATE CIVIL SERVICE COMMISSION and ABRAHAM D. BEAME, Comptroller of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

JOHN H. MARIANO,
Attorney for Petitioner,
110 East 42nd Street,
New York City 17, New York.

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

To the Honorable the Chief Judge and the Associate Judges of the United States Supreme Court:

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

John H. Mariano, on behalf of Anthony Roma, Anthony Grillo and for all others in the employ of the Transit Authority, City of New York similarly situated, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York.

Opinions Below

The opinion of the Supreme Court, New York County was entered on January 20th, 1965 and is not reported. The Supreme Court Appellate Division First Department af-

firmed the order of the Supreme Court without opinion by order entered June 9th, 1964. Said order is reported at 21 A. D. 2nd 856, 251 N.Y.S. 2nd 1022. The order denying petitioners' motion for re-argument before the Appellate Division, was entered on September 22, 1964, and is not reported. The order denying plaintiffs' motion for leave to appeal was entered on November 19, 1964 and is not reported. The opinion of the Supreme Court, the orders of the Appellate Division, and the Court of Appeals are appended hereto in Appendix "A".

Jurisdiction

1—The final order denying applicants' motion for leave to appeal to the Court of Appeals was entered on November 19th, 1964 (See Appendix "A"). The Jurisdiction of the Court is invoked under 28 U. S. Code 1257 (2) & (3).

The Questions Involved

(1) Have the two petitioners been denied due process of law by reason of the introduction of a system of classifying employees by grades under Civil Service without their consent?

The reason underlying the contention raised under this question is as follows:

Under New York Statute Labor Law 220, the two petitioners had acquired a vested right to be paid the prevailing rate of pay given in private industry to persons doing the same work as they are doing for the New York City Transit Authority. By a change in the method of classification they are receiving lower wages than are the prevailing rates being paid today and that such discrimination is being practiced without due process of law.

(2) Have the two petitioner employees been deprived of a constitutionally protected property right to be paid

prevailing rates of pay in their work classifications through the act of transferring them from employees of a Municipal to employees of a Public Benefit Corporation?

The rationale underlying this question and the reasoning pertinent thereto is the following:

Both the City of New York and the New York City Transit Authority are separate and distinct corporations. The City of New York is a municipal corporation; the New York City Transit Authority is a Public Benefit Corporation. Each functions under a separate and different charter. One of the conditions inherent in the charter of this public Benefit Corporation is that it (the New York City Transit Authority) must compulsorily pay to its employees prevailing rates of pay found among workers doing similar tasks in private industry. The two petitioners are employees of the New York City Transit Authority and are being deprived of prevailing rates of pay unconstitutionally.

(3) Has there been confiscation of property without due process when an employee of a Public Benefit Corporation is treated for varying purposes in one instance as a City of New York Municipal employee and for other purposes as the employee of a Public Benefit Corporation such as the New York City Transit Authority.

The municipal corporation City of New York and the Public Benefit Corporation, New York City Transit Authority pursue a sliding scale sort of procedure and manipulations making use of the so called rating system for classifying municipal employees under which system employees of an entirely distinct corporation, to wit, the New York City Transit Authority employees are victimized through such grading system by taking away from them unconstitutionally and therefore illegally their vested right to maintain unimpaired the receipt of prevailing rates of pay free from any collusion between the two corporations and removed from extraneous purposes such as the maintenance of the fifteen cent subway fare.

Statutes Involved

The following Statutes provisions are set forth in Appendix B: 28 U. S. Code 1257 (2) and (3), New York State Constitution Article 1, Sec. 17; New York Statutes, Public Authorities Law Secs. 1201, 1202, 1203, 1204, 1205, 1210; Labor Law Sec. 220 (1) & (3); Civil Service Law Sec. 115 & 118 (1).

Statement of the Case

Petitioners are employees of the New York City Transit Authority, a Public Benefit Corporation of the State of New York. This action was commenced in the Supreme Court of the State of New York, seeking a declaratory judgment that petitioners as skilled tradesmen employed by the New York City Transit Authority are required to be paid prevailing rates of pay pursuant to the Constitution of the State of New York and Sec. 220 of the Labor Law.

Anthony Roma is a Stationary Engineer charged with the maintenance and operating of a Transit Authority electrical power substation which converts the 11,000 volts alternating current received, from Consolidated Edison feeder lines and reduces same into 650 volts direct current for distribution to the 3rd rail for operation of subway trains. Mr. Roma is employed under the classification title of "Power Maintainer B". Stationary Engineers in the employ of the City of New York are presently paid approximately $4.25 an hour. Petitioner Roma is paid $3.30 an hour.

Petitioner Anthony Grillo is a carpenter employed by the New York City Transit Authority and goes about his everyday duties with the tools and equipment which are typical of all tradesmen practicing the trade of carpentry.

Mr. Grillo's duties with the Transit Authority are restricted solely to performance work commonly known and

described as carpentry and construction. He is classified and employed under the title "Structure Maintainer A". A carpenter in the employ of the City of New York is paid $5.25 an hour approximately. Petitioner Grillo is paid $3.23 an hour.

Both men are paid at rates substantially less than the prevailing rate of pay for others performing the same work in private industry and by the City of New York.

These petitioners contend that the Constitution and the laws of New York require that they be paid prevailing rates of pay. That they cannot be denied this right by the mere camouflage of a non-descriptive or non-generic title, that the work they are performing is that of a Stationary Engineer and of a Carpenter, that there are similar positions and there are workers who are performing the same functions (under less hazardous conditions) in the employ of the City of New York and in private industry. Being deprived of higher pay through an illegal form of classification of work titles, the maintenance and operation of such work titles disproves these plaintiffs and all others similarly situated, of prevailing rates of pay and is confiscatory of their property rights since the rights to receive prevailing pay rates is a property right that the Federal Constitution can and does protect.

ARGUMENT

Reasons for Granting the Writ

Petitioners maintain that by various subterfuges and illusionary procedures followed by the City of New York, the New York City Transit Authority, the New York City Municipal Civil Service Commission and the State Civil Service Commission, they have been denied equal protection of the law, discriminated against and have had their property and rights thereto illegally confiscated.

Petitioners are electricians and carpenters and other skilled tradesmen, employed by a Public Authority created by an act of the New York State Legislature. Through various maneuvers and illegal procedures, they have been what is called "Salary graded" and taken from out of the salary classification which they originally enjoyed. Whereas petitioners are paid approximately $3.40 per hour for their labor (and under hazardous conditions); other employees of the City of New York performing the same duties are being paid approximately $2.00 or $3.00 an hour *more*.

The New York State constitution and statutes provide that Public Benefit Construction employees such as petitioners herein are required to be paid prevailing wages rates of pay, and in fact New York City is actually now paying other skilled tradesmen prevailing rates of pay. However, through the technique of grading and classification procedures and by changing their work classification title from carpenter to "Structure Maintainer A" for example they have squirreled these men out of their original categories and are paying them at wages of approximately $2.00 per hour less than other employees of the City of New York doing the same work.

This illegal procedure was continued after the State Legislature created at the request of the City of New York, the New York City Transit Authority and provided therein that these men shall be subject "to Civil Service Law", and who were then without notice transferred from the payroll of the City of New York to this new entity, the New York Transit Authority, an act which took away from them their State Constitutional Civil Service protection but yet which resulted in keeping them under the illegal onus of the prior discriminatory wage practices of the City of New York by denying them their just and lawful wage.

Thus the petitioners have been placed in a purgatory where they can neither go up nor down. The City uses

this situation to its advantage for when it sees fit. The petitioners are regarded and treated as and called employees of the Transit Authority, yet when it suits the Transit's needs of the moment they are then called, treated and regarded as employees of the City of New York, as municipal employees.

It is through these subterfuges and proceedings that the City of New York is able to and has succeeded up to now in depriving these petitioners and others similarly situated from receiving their just and lawful wage.

In defending this case, the City of New York has based part of its defense in this action by pleading that the additional cost and expenses that would be incurred if it were to pay these men their lawful wage would result in raising its subway fares; that this would require an increase in the 15¢ subway fare which the Mayor of the City of New York is pledged to maintain. Thus the lawful wages of these men are being used to maintain or sustain a political promise of the Mayor of the City of New York. It is interesting at this point to note that under the Legislation creating the Transit Authority it is both in fact and in theory an entity independent of the City and as such is required by law under its charter to pay its own operating expenses from out of its revenues.

The question presented is one of great importance in that petitioners such as these as able to be skuffled on or "bounced" around and it is a mere administrative ruling which deprives them of rights which are lawfully theirs, and as a result these men are being unlawfully discriminated against and their property rights confiscated.

Respectfully submitted,

JOHN H. MARIANO,
Attorney for Petitioners.

APPENDIX "A"

Decisions Below

1. Decision—Supreme Court, New York County, Justice Lupiano

"Matter of Roma (Municipal Civil Service Commission, City of N. Y.)—Motions under calendar numbers 13, 14 and 15 of even date are consolidated herein and disposed of as follows: The several defendants separately move for summary judgment. Plaintiffs, who are holders of graded positions in the classified civil service, seek a declaratory judgment that they are entitled to the prevailing rate of wages (see section 220, Labor Law). They allege that the purpose of grading their positions was to destroy their right to be paid such rate of wages. The positions held by plaintiffs were first graded by resolution of the Municipal Civil Service Commission (December 29, 1942) which resolution was approved by the mayor (February 2, 1943), and by the State Civil Service Commission (February 25, 1943). Since this original grading resolution, further resolutions have been passed, which have fixed wage scales for the transit authority's graded employees, including the plaintiffs in this action. The major thrust of plaintiff's voluminous affidavits and briefs is an attempt to remove the present complaint from the law as enunciated by our Court of Appeals in Matter of Corrigan v. Joseph (304 N. Y. 172, motion to amend remittitur den. 304 N. Y. 759, cert. den. sub nom. Remelius v. Joseph, 345 U. S. 924; and Matter of Foy v. Schechter, 1 N. Y. 2d 604). Plaintiffs argue that the holdings in these cases are limited to municipal employees, and that the present plaintiffs are not municipal employees. Plaintiffs further contend that they are employees of a contractor or subcontractor, and therefore, are entitled to the prevailing

rate of wage under the New York State Constitution, Article I, section 17, which provides as follows: '* * * No laborer, workman or mechanic, *in the employ of a contractor or subcontractor* engaged in the performance of any public work, shall be permitted to work more than eight hours in any day or more than five days in any week, except in cases of extraordinary emergency; nor shall he be paid less that the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used * * *.' (Emphasis supplied.) Plaintiffs' contentions are without basis in law or fact. It is important to note that the petitioners in Foy v. Schechter (supra), were also employees of the New York City Transit System. Accordingly, there being no triable issues of fact, and similar issues of law having been determined heretofore by the Court of Appeals in the Corrigan and Foy cases, these motions are granted. Settle orders accordingly."

Appendix "A"

2. Order—Supreme Court, New York County

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the Court House thereof, Centre and Pearl Streets, Borough of Manhattan, City of New York, on the 21st day of January, 1964.

Present: Hon. Vincent A. Lupiano, Justice.

In the Matter of the Application of:

Anthony Roma individually, a power maintainer and Anthony Grillo, a carpenter, and for all others in the employ of The Transit Authority City of New York, similarly situated,

Plaintiffs,

against

Municipal Civil Service Commission, City of New York, Transit Authority, City of New York, State Civil Service Commission, Abraham D. Beame, Comptroller of The City of New York, and Board of Estimate of New York City,

Defendants.

The above-named defendants having moved, pursuant to Rule 3212 of the Civil Practice Laws and Rules for an order granting the defendants summary judgment dismissing the complaint on the grounds that the complaint fails to state a meritorious cause of action, that the defendants' affirmative defenses pleaded in their answers entitled them

to summary judgment, and that there are no issues of fact to be tried, and for such other, further and different relief as to the Court might seem just and proper;

Now, on reading and filing the notice of motion of the defendants, Municipal Civil Service Commission of The City of New York, Abraham D. Beame, and Board of Estimate of New York City, dated September 16, 1963, and the affidavit of Theodore H. Lang, sworn to the 16th day of September, 1963, attached thereto, the notice of motion of the defendant, New York State Department of Civil Service, dated September 26, 1963, and the affidavit of Mortimer Sattler, sworn to the 26th day of September, 1963, attached thereto, the notice of motion of the defendant, New York City Transit Authority, dated September 23, 1963, and the affidavit of Daniel T. Scannell, sworn to the 17th day of September, 1963, attached thereto, and the summons, the complaint, and the answers of the defendants, and the repy affidavit of Daniel T. Scannell, sworn to the 21st day of November, 1963, in support of said motions, and the affidavit of John H. Mariano, Esq., sworn to the 1st day of November, 1963, in opposition thereto; and after hearing Leo A. Larkin, Esq., by Albert Cooper, Esq., of counsel, attorney for defendants Municipal Civil Service Commission of the City of New York, and the Board of Estimate of New York City; Louis J. Lefkowitz, Esq., by Mortimer Sattler, Esq., of counsel, attorney for the defendant State Civil Service Commission; and Sidney Brandes, Esq., by Edward L. Cox, Jr., Esq., of counsel, attorney for the defendant New York City Transit Authority, all in support of said motions; and Mariano & Bisceglia, Esqs., by John H. Mariano, Esq., of counsel, attorneys for the plaintiffs, in opposition thereto, and due deliberation having been had, and upon filing the opinion

and decision of the Court, dated January 6, 1964, and on motions of Leo A. Larkin, Esq., Louis J. Lefkowitz, Esq., and Sidney Brandes, Esq., attorneys for the defendants, it is

ORDERED, that the said motions be and the same are hereby, in all respects, granted, and it is further

ORDERED, that the complaint be dismissed, and that a judgment dismissing the said complaint, with costs and disbursements to be taxed, be entered by the Clerk of this Court.

Enter,

VAL,
J. S. C.

Filed
Jan 22, 1964
New York County Clerk's Office

Appendix "A"

3. Order—Supreme Court, Appellate Division, First Department—Affirming Order of Supreme Court, New York County

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 9th day of June, 1964.

Present—Hon. Charles D. Breitel,
Justice Presiding.
" Francis L. Valente,
" Harold A. Stevens,
" Aron Steuer,
" Ellis J. Staley, Jr.,
Justices.

7559

In the Matter of the Application of Anthony Roma individually, a power maintainer, and Anthony Grillo, a carpenter, and for all others in the employ of The Transit Authority, City of New York, similarly situated,

Plaintiffs-Appellants,

vs.

Municipal Civil Service Commission, City of New York, Transit Authority, City of New York, State Civil Service Commission, Abraham D. Beame, Comptroller of The City of New York, and Board of Estimate of New York City,

Defendants-Respondents.

Appendix "A"

Affirmance of Order

An appeal having been taken to this Court by the plaintiffs-appellants from an order of the Supreme Court, New York County, entered on the 22nd day of January, 1964, granting defendants' motions for summary judgment, and said appeal having been argued by Mr. John H. Mariano of counsel for the appellants, and by Mr. Mortimer Sattler of counsel for respondent State Civil Service Commission, by Mr. Alfred Weinstein of counsel for respondent City of New York, et al., and by Helen R. Cassidy of counsel for respondent New York City Transit Authority, and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $20 costs and disbursements to the respondents.

Enter:

(signed) Vincent A. Massi,
Clerk.

Appendix "A"

4. Order—Appellate Division, First Department—Denying Petitioners' Motion for Leave to Reargue

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 22nd day of September, 1964.

Present—Hon. Charles D. Breitel,
Justice Presiding.
" Francis L. Valente,
" Harold A. Stevens,
" Aron Steuer,
" Ellis J. Staley, Jr.,
Justices.

In the Matter of the Application of Anthony Roma, etc.,

Plaintiffs-Appellants,

vs.

Municipal Civil Service Commission,
City of New York, et al.,

Defendants-Respondents.

The above named plaintiff-appellants having moved for leave to reargue their appeal from the order of the Supreme Court, New York County, entered on January 22, 1964, which order was unanimously affirmed by order of this Court, entered on June 9, 1964, or, in the alternative, for leave to appeal to the Court of Appeals,

Appendix "A"

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of William E. Mariano in support of said motion, and the affidavits of Alfred Weinstein and Helen R. Cassidy in opposition thereto, and after hearing Mr. William E. Mariano for the motion, and Mr. Alfred Weinstein and Helen R. Cassidy opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied with $10 costs.

Enter:

VINCENT A. MASSI,
Clerk.

Appendix "A"

5. Order—Court of Appeals—Denying Petitioners' Motion for Leave to Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Nineteenth day of November A. D. 1964.

Present: HON. CHARLES S. DESMOND,
Chief Judge, presiding.

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1 Mo. No. 842

ANTHONY ROMA individually, etc., & ano., etc., and for all others in the employ of the Transit Authority, City of New York, similarly situated,

Appellants,

vs.

MUNICIPAL CIVIL SERVICE COMMISSION, CITY OF NEW YORK, TRANSIT AUTHORITY, CITY OF NEW YORK, STATE CIVIL SERVICE COMMISSION and ABRAHAM D. BEAME, Comptroller of the City of New York,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

[SEAL] A copy

S/S GEARON KIMBALL,
Deputy Clerk.

APPENDIX "B"

28 U.S.C.A. 1257 State Courts; appeal; Certiorari.

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States and the decision is in favor of its validity.

(3) by writ of certiorari, where the validity of a treaty or statute of the U. S. is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution or treaties or laws of the U.S., or where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of, or commission held on authority exercised under the U. S.

Appendix "B"

New York State Constitution—Art I—Sec. 17

SEC. 17 (Labor not a commodity; hours and wages in public work; right to organize and bargain collectively.)

Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed.

No laborer, workman or mechanic, in the employ of a contractor or subcontractor engaged in the performance of any public work, shall be permitted to work more than eight hours in any day or more than five days in any week, except in cases of extraordinary emergency; nor shall he be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used.

Employees shall have the right to organize and to bargain collectively through representatives of their own choosing. Adopted by Constitutional Convention of 1938; approved by the people November 8, 1938.

New York Statute—Labor Law

SEC. 220—HOURS AND WAGES

1. Eight hours shall constitute a legal day's work for all classes of employees in this state except those engaged in farm and domestic service unless otherwise provided by law . . .

3. The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works, shall not be less than the prevailing rate

of wages as hereinafter defined. Serving laborers, helpers, assistants and apprentices shall not be classified as common labor and shall be paid not less than the prevailing rate of wages as hereinafter defined. The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall be not less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with which such labor is performed in its final or completed form is to be situated, erected or used and shall be paid in cash; . . .

Appendix "B"

New York Statutes—Civil Service Law

SEC. 115—Policy of the state.

In order to attract unusual merit and ability to the service of the state of New York, to stimulate higher efficiency among the personnel, to provide skilled leadership in administrative departments, to reward merit and to insure to the people and the taxpayers of the state of New York the highest return in services for the necessary costs of government, it is hereby declared to be the policy of the state to provide equal pay for equal work, and regular increases in pay in proper proportion to increase of ability, increase of output and increase of quality of work demonstrated in service. L.1958, c. 790, eff. April 1, 1959.

SEC. 118—Powers and duties of the Director of Classification and Compensation.

1. General powers and duties. (a) The director of the classification and compensation division shall be charged generally with the duty and shall have the power

(1) to classify and reclassify all positions in the classified civil service of the state;

(2) to allocate and reallocate to an appropriate salary grade specified in section one hundred thirty of this article all positions in the competitive and noncompetitive classes of the classified civil service of the state, except temporary, part-time or seasonal positions, and positions the salaries of which are otherwise specifically set forth in a statue.

b) The director in his discretion may allocate and reallocate to an appropriate salary grade specified in section

one hundred thirty of this article, seasonal positions and positions in the labor class.

(c) The principle of fair and equal pay for similar work shall be followed in the classification and reclassification and the allocation and reallocation of positions pursuant to this article and all positions having the same title shall be allocated to the same salary grade.

New York Statute—Public Authority Law

Title 9—New York City Transit Authority

Sec. 1201—New York Cty Transit Authority

1. A board, to be known as "New York City Transit Authority" is hereby created. Such board shall be a body corporate and politic constituting a public benefit corporation. It shall consist of three members. One member shall be appointed by the governor. After the appointment and qualification of such two members, they shall, as promptly as possible, appoint a third member who shall be chairman of such board.

Sec. 1202—Purposes of the Authority

1. The purposes of the authority shall be the acquisition of the transit facilities operated by the board of transportation of the city and the operation of transit facilities in accordance with the provisions of this title for the convenience and safety of the public on a basis which will enable the operations thereof, exclusive of capital costs, to be self-sustaining.

2. It is hereby found and declared that such purposes are in all respects for the benefit of the people of the state

of New York and the authority shall be regarded as performing a governmental function in carrying out its corporate purpose and in exercising the powers granted by this title. Formerly Sec. 1802, added L. 1953, c. 200; renumbered 1202, L. 1957, c. 914, Sec. 3, eff. April 24, 1957.

SEC. 1203—Transfer of Transit Facilities by the City to the Authority

1. (a) On or before June first, nineteen hundred fifty-three, the city may, by resolution of the board of estimate or by instruments authorized by any such resolution, enter into an agreement with the authority for the transfer to the authority, for use in the execution of its corporate purposes, of the transit facilities now owned or hereafter acquired or constructed by the city and any other materials, supplies and property incidental to or necessary for the operation thereof. Any such agreement shall provide for transfer of such facilities by deed, lease, license or other arrangement, provided the term thereof shall not be less than ten years and authorize the authority to take jurisdiction, control, possession and supervision of such transit facilities, material, supplies and property on or before June Fifteenth, nineteen hundred fifty-three.

(b) Such agreement shall provide that capital costs of a nature not heretofore charged as operating expenses shall be paid by the city, or at the option of the authority may be paid in the first instance by the authority but in such event, the authority shall be entitled to recover from the city the amount of such costs; provided, however, that the total amount of such capital costs which the authority may incur without the approval of the board of estimate in any fiscal year shall not exceed five million dollars and that no other such capital costs shall be incurred by the authority without such approval. Where the city is re-

quired to reimburse the authority for the amount of any capital costs pursuant to such agreement, serial bonds or capital notes may be issued by the city, pursuant to the local finance law, to finance any such reimbursement in the same manner and to the same extent as if such costs were to be paid directly by the city.

The authority shall submit annually to the city planning commission and the director of the budget of the city on or before August 15th in each year an estimate of all such capital costs for inclusion in the capital budget of the city.

(c) Such agreement shall provide that the authority shall have the use and possession of all property owned and leased by the city and used or occupied by the board of transportation on March 15th, nineteen hundred fifty-three in connection with or incidental to the operation of such transit facilities.

(d) No provision in such agreement shall purport to limit or restrict or have the effect of limiting or restricting, the power granted the authority to manage, control or direct the maintenance and operation of such transit facilities or the fares or service thereof.

2. Such agreement shall provide for payment by the city of:

(a) Capital costs for projects connected with such transit facilities included in the capital budget of the city for periods prior to December thirty-first, nineteen hundred fifty-three, except that the authority shall not require payment of, and the city shall not pay, capital costs of such projects without prior approval of the board of estimate.

(b) Liabilities of the city or the board of transportation for:

(1) Pension or retirement contributions on behalf of persons who were employed on transit facilities heretofore acquired by the city.

(2) Contributions to the New York City employees' retirement system on behalf of officers or employees whose compensation has been paid out of the operating revenues of the board of transportation of the city, which contributions have or shall hereafter become due or payable for fiscal years of the city ending on or before June thirtieth, nineteen hundred fifty-three.

(c) All other liabilities of the board of transportation on the date of the conveyance.

(d) Ten million dollars derived from any funds of the city (but not from borrowed funds), or from the operating fund of the board of transportation at the time of such transfer, for use by the authority as initial working capital (1) in partial consideration of the acceptance by the authority of the initial transfer, in which case the sum shall not be repaid, or (2) as a loan, in which case such sum shall be repaid in not less than five nor more than ten equal annual installments, commencing July first, nineteen hundred fifty-four.

3. (a) Such agreement may contain provisions relating to the use and occupancy by the authority of real property (in addition to that transferred pursuant to subdivision one of this section) now or hereafter owned or leased by the city, on such terms as may be mutually agreed upon by the city and the authority, and may provide for or authorize surrender to the city of property no longer required by the authority.

(b) The authority shall be entitled to utilize the officers, employees, agents, facilities and service of the city on the

same terms and conditions as were applicable to or provided to the board of transportation on March fifteenth, nineteen hundred fifty-three.

4. The city and the authority are hereby authorized and empowered to make or enter into any contracts, agreements, deeds, leases, conveyances or other instruments as may be necessary to implement the provisions of this section.

5. Upon the filing by the authority with the clerk of the city and the secretary of state of a copy of the instruments or documents effectuating the transfer, the authority shall take possession and control of the transit facilities and other property transferred thereby together with all contracts, books, maps, plans, papers and records of or in the possession of the board of transportation of whatever description, incidental to or necessary for the operation of the facilities transferred by such agreement or the performance of the duties of the authority as provided by this title.

6. When in the discretion of the authority there is available a supply of electric power adequate for the efficient and proper operation of the transit facilities either from a private utility or otherwise at rates and under circumstances deemed by the authority to be reasonable, the authority may make such provisions for the utilization of such electric power as it may see fit and surrender to the city the power plants presently leased by the authority from the city pursuant to the provisions of this title. The foregoing provisions of this subdivision shall be applicable only to actions of the authority undertaken prior to February first, nineteen hundred and sixty. Formerly Sec. 1803, added L. 1953, c. 200; amended L. 1953, c. 201 Secs.

4, 5; L. 1953, c. 880, Secs. 1, 2; renumbered 1203, L. 1957, c. 914, Sec. 3; amended L. 1959, c. 857, Sec. 2, eff. April 24, 1959.

Sec. 1204—General Powers of the Authority

1. To sue and be sued.

2. To have a seal and alter the same at pleasure.

3. To acquire, hold, use and dispose of equipment, devices and appurtenances, and other property for its corporate purposes.

4. To make rules and regulations for its organization and internal management.

5. To appoint a general manager and other officers, assign powers and duties to them, and fix their compensation.

5-a. To make, amend and repeal rules for the regulation of the use of the transit facilities under its jurisdiction in order to promote the safety of passengers and to protect such physical facilities. Violation of such rules shall be an offense punishable by a fine of not exceeding twenty-five dollars or by imprisonment for not longer than ten days, or both.

6. To appoint employees and fix their compensation subject to the provisions of the civil service law and to grant, in its discretion, cash payments to the surviving spouse or to the legal representatives of its deceased employees, equal to the current monetary value of accumulated and unused vacation time, if any, and the monetary value of accumulated and unused overtime, if any, for overtime which was worked and credited subsequent to June fifteenth, nineteen hundred fifty-three, computed at the rate of salary in effect at the time the overtime was worked, standing to

the credit of its employees as of the time of their death and, notwithstanding the provisions of section one hundred thirty-five of the civil service law or any other state or local law to the contrary, to grant, in its discretion, severance pay to surplus employees on separation from service.

SEC. 1205—RATES OF FARE

Notwithstanding the provisions of any other law, the terms of any contract or franchise, between the first day of January and the thirtieth day of June in any year, the authority shall have the power to fix or adjust the rate or rates of fare to be charged for the use of any transit facility operated by the authority as may in the judgment of the authority be necessary to produce sufficient revenue to meet the expenses of the operations of the authority and to maintain such operations on a self-sustaining basis. Any such charge in the rate or rates of fare shall become effective on a specified date during such period or on the first day of July of any year except that during the year nineteen hundred fifty-three any such change may be fixed on or before July fifteenth and become effective on or before July thirtieth of such year. Formerly Sec. 1805, added L. 1953, c. 200; renumbered 1205, L. 1957, c. 914, Sec. 3, eff. April 24, 1957.

SEC. 1210—EMPLOYEES

1. Employees in the competitive and labor classes of the classified service in the employ of the board of transportation, and performing services in respect to subject or matters, jurisdiction of which was transferred to the authority, with the approval of the authority shall be transferred to comparable positions in the employ of the authority; and, any officers and other employees of such board of transportation may be so transferred and appointed by the authority.

Appendix "B"

2. The appointment, promotion and continuance of employment of all employees of the authority shall be governed by the provisions of the civil service law and the rules of the municipal civil service commission of the city. Employees of any board, commission or department of the city may be transferred to positions of employment under the authority in accordance with the provisions of the civil service law and shall be eligible for such transfer and appointment without examination to such positions of employment. Employees who have been appointed to positions in the service of the city under the rules of the municipal civil service commission of the city shall have the same status with respect thereto after transfer to positions of employment under the authority as they had under their original appointments. Employees of the authority shall be subject to the provisions of the civil service law.

3. Officers and employees of the city who are members or beneficiaries of any existing pension or retirement system shall continue to have the rights, privileges, obligations and status with respect to such system or systems as if they had continued in their city offices or employments. Employment by the authority shall constitute city service for the purposes of title B of chapter three of the administrative code of such city and the contributions required to be made by the authority pursuant to section B 3-20.0 of such code shall be an operating expense of the authority.

FILED
MAR 15 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 913

ANTHONY ROMA individually, etc. & ano., etc., and for all others in the employ of the Transit Authority, City of New York, similarly situated,

Petitioner,

—VS.—

MUNICIPAL CIVIL SERVICE COMMISSION, CITY OF NEW YORK, TRANSIT AUTHORITY, CITY OF NEW YORK, STATE CIVIL SERVICE COMMISSION and ABRAHAM D. BEAME, Comptroller of the City of New York,

Respondents.

BRIEF OF THE RESPONDENT, NEW YORK CITY TRANSIT AUTHORITY, IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI

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In the

Supreme Court of the United States

October Term, 1964

No. 913

Anthony Roma individually, etc. & ano., etc., and for all others in the employ of the Transit Authority, City of New York, similarly situated,

Petitioner,

—vs.—

Municipal Civil Service Commission, City of New York, Transit Authority, City of New York, State Civil Service Commission and Abraham D. Beame, Comptroller of the City of New York,

Respondents.

BRIEF OF THE RESPONDENT, NEW YORK CITY TRANSIT AUTHORITY, IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI

Statement

The respondent, New York City Transit Authority, operates the transit facilities owned by the City of New York. Petitioner, who is employed by the Authority as a power maintainer, a position in the competitive class of the classified civil service, seeks to have this Court review the determinations of the New York courts with respect to his proper rate of pay.

The New York State Supreme Court, New York County, and the Appellate Division of the New York State Supreme Court, First Department, have each held that petitioner does not occupy a position covered by the provisions of a New York statute (Labor Law [Cons. Laws, Chap. 31], §220), which governs the wage rates of mechanics, laborers and workmen employed on public works. The Appellate Division and the New York Court of Appeals each denied petitioner's respective motions for leave to appeal to the Court of Appeals (15 N Y 2d 482).

The New York courts, following their earlier decisions in *Matter of Corrigan* v. *Joseph,* 304 N. Y. 172 (1952) and *Matter of Foy* v. *Schechter,* 1 N Y 2d 604 (1956), held that transit employees, such as the petitioner, serving in graded positions in the classified civil service were not "mechanics, laborers and workmen" within the purview of Labor Law, §220 so as to have their wages fixed by the prevailing rate formula. In the *Corrigan* case the petitioners sought a writ of certiorari which this Court denied, *sub nom. Remelius* v. *Joseph,* 345 U. S. 924 (1953). The present petition should similarly be denied.

Argument

We urge the following objections to the jurisdiction of this Court: (1) no federal question was presented or passed upon by the New York courts and (2) no substantial federal question is involved in this case.

I.

No federal question was raised or passed upon in the state courts.

At no time, either in the pleadings, upon argument, or in the briefs submitted to the New York courts, did the petitioner contend that the fixation of his rate of wages by the governmental entity in which he is employed, deprived him of any right guaranteed by the Constitution of the United States.

The petition fails to set forth any federal question raised in the state courts nor does it indicate how it was raised, at what stage in the proceedings, and how it was passed upon. In short, the petitioner ignores Rule 23, para. 1 (f) of the Rules of this Court. He cannot do otherwise, since no federal question was ever raised in the state courts.

Indeed, had the petitioner believed that he had a federal constitutional question, he would not have twice sought leave to appeal to the Court of Appeals but would have appealed as a matter of right. Under New York practice, an appeal may be taken to the Court of Appeals as a matter of right from a final determination of the Appellate Division where a constitutional question is directly involved. (New York Civil Practice Law and Rules, §5601, subd. b; *Ellis* v. *Dixon,* 349 U. S. 458 [1955], rehearing denied 350 U. S. 855.)

The petitioner in his statement of the case (pp. 4-5) has considerably departed from and enlarged the record which was before the state courts, in describing his title, his duties and in citing rates of pay allegedly paid others for similar duties. It is fundamental that this Court will not review

the determinations of state courts on matters which, not being part of the record before the state courts, could not have been considered by those courts. *Rodriguez* v. *Vivoni*, 201 U. S. 371, 377 (1906); *Edward Hines Trustees* v. *Martin*, 268 U. S. 458, 465 (1925).

It is equally well settled that a petitioner is not entitled to raise in this Court claimed violations of constitutionally guaranteed rights not presented to the state courts. *Dewey* v. *Des Moines*, 173 U. S. 193 (1899); *Beck* v. *Washington*, 369 U. S. 541, 558 (1962) quoting from *United States ex rel. Darcy* v. *Handy*, 351 U. S. 454, 462 (1956).

II.

No substantial federal question is presented in this case.

For the first time in this litigation petitioner now asserts that he has been denied "due process" and has been "deprived of a constitutionally protected property right". Presumably these claims are based on the Fourteenth Amendment to the United States Constitution although the petition does not set forth any constitutional provision other than a portion of Article I of the New York State Constitution (pp. 4 and 19).

Petitioner urges (Petition, p. 2) that he was denied due process by being deprived of his "vested right" to be paid wages, as prescribed by a New York statute, Labor Law §220, when his position was graded in the classified civil service. This was the very argument made and rejected in the *Corrigan* case, *supra*. The state courts held in that case, and have repeated here, that by reason of an employee's status in the graded civil service, with its concomitant benefits, his position is not within the purview of

Labor Law §220. Thus, petitioner has no "vested right" to any rate of pay except that fixed by his public employer, after bargaining negotiations with the recognized union which represents employees in his category.

Petitioner also claims (Petition, pp. 2-3) to have been deprived of a constitutionally protected property right by reason of his transfer from the employ of a city agency to the employ of the New York City Transit Authority. Such transfers were made necessary in 1953 by the abolition of the agency of the City of New York (Board of Transportation), which had formerly operated the transit facilities, and the creation by the New York legislature of the governmental agency known as the New York City Transit Authority which took over the operation of the city-owned transit facilities and has operated them since that time. (Public Authorities Law, Article 5, Title 9, §§1200-1221 [Cons. Laws, chap. 43-A].) As authorized by the statute, all Board employees were transferred to the new Authority, retaining their former civil service status and retirement system membership. They continued to perform their former duties on a transit system. The state courts, in the *Foy* case, *supra,* which arose after the creation of the Transit Authority, and in the instant case, have found that there was no change in the petitioner's status because of this statutory transfer which would alter the application to him of the *Corrigan* decision.

The assertion (Petition, p. 3) that two governmental agencies, the City of New York and the Transit Authority, are acting in collusion to deprive the petitioner of his salary rights is nowhere supported in the record of this case and is, of course, untrue.

There is no federal question whatever involved in this case. The sole claim of the petitioner is that his wages

have been improperly fixed by the local government agency for which he works. That argument was rejected by the New York courts in the *Corrigan* and *Foy* cases, *supra*, and again in the instant case. In reaching these conclusions, the state courts have interpreted the Constitution of the State of New York and the state's Labor Law. Clearly the rates of wages to be paid employees by local governments are, and should remain, like other matters of local concern, wholly within the jurisdiction of the State, the state courts and local officials. *Dodge* v. *Board of Education*, 302 U. S. 74, 78-79 (1937); *Shoener* v. *Pennsylvania*, 207 U. S. 188, 195 (1907); *American Railway Express Co.* v. *Kentucky*, 273 U. S. 269, 272 (1927).

CONCLUSION

The petition for a writ of certiorari should be denied.

March 12, 1965

Respectfully submitted,

SIDNEY BRANDES
Counsel for Respondent
New York City Transit Authority

HELEN R. CASSIDY
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FILED
MAR 15 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 913

ANTHONY ROMA individually, etc. & ano., etc., and for all others in the employ of the Transit Authority, City of New York, similarly situated,

Petitioner,

—vs.—

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Respondents.

MEMORANDUM IN OPPOSITION OF RESPONDENTS MUNICIPAL CIVIL SERVICE COMMISSION, ET AL.

Petitioners assert that their jobs bring them within the coverage of a New York statute which provides a method of fixing wages in certain employments. No claim has heretofore been made under federal law, nor would the facts have permitted such a claim. Except in one respect, this case is not different from *Matter of Corrigan* v. *Joseph*, 304 N.Y. 172 (1952), in which this Court denied certiorari *sub nom. Remelius et al.* v. *Joseph*, 345 U.S. 924. The difference lies in the circumstance that Remelius was employed by an agency of the City of New York, the Board of

Transportation, whereas the instant petitioners are employed by the Transit Authority, a later-created public benefit corporation which has succeeded to the functions performed by the former Board of Transportation and to which the Board's employees were transferred. This difference is immaterial, so far as a federal issue is concerned. The petition is patently without merit.

March 12, 1965.

Respectfully submitted,

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IN THE

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March 12, 1965.

Respectfully submitted,

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